IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15970

CITIZENS FOR FREE SPEECH, LLC and MICHAEL SHAW,
Plaintiffs-Appellants,
v.
COUNTY OF ALAMEDA; ALAMEDA COUNTY EAST COUNTY BOARD OF ZONING ADJUSTMENTS; FRANK J. IMHOFF, SCOTT BEYER, and MATTHEW B. FORD, in their official capacities as members of the Alameda County East County Board of Zoning Adjustments,
Defendants-Appellees.

APPELLANTS' REPLY BRIEF

D.C. No. 4:18-cv-00834-SBA
U.S. District Court Northern District of California, Oakland

FRANK C. GILMORE, ESQ.
California Bar No. 283859
ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, Nevada 89503
Telephone: (775) 329-3151
Facsimile: (775) 329-7941
Attorneys for Plaintiffs-Appellants-
CITIZENS FOR FREE SPEECH, LLC and
MICHAEL SHAW

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ARGUMENT IN REPLY

A. Rule 13(a) Bars All Subsequent Actions Between the Parties, Not Just Subsequent Claims Raised in Federal Court.

Defendant/Appellee Alameda County's (hereinafter "County") primary argument in the Answering Brief is that Fed. R. Civ. P. 13(a) is merely a federal procedural rule that does not bar subsequent state and administrative actions between the parties. This contention is meritless. In the same vein, the County then contends that Rule 13(a) cannot be as expansive as the plain language of the Rule suggests, in requiring local governments to conduct their respective administrative proceedings (like abatement) in federal court, citing to the County's rights under the Rules Enabling Act. This argument is misplaced and should be rejected.

1. Rule 13(a) Bars All Subsequent Actions Between the Parties Related to the Original Action, Whether in State Court, Foreign Courts, or in Administrative Proceedings.

The language of Rule 13(a) provides the first rebuttal to the County's position. The Rule requires that the County must bring a counterclaim for "any claim" which "arises out of the transaction or occurrence that is the

subject matter of the opposing party's claim." (emphasis added). The Rule makes no exception for the manner in which the claim may be styled, or where the claim might be more regularly held, like a County administrative proceeding. Of course, the County provided no authority supporting the argument that "any claim" does not also mean abatement claims which the County had available to it at the time of the Prior Action. Indeed, the authorities applying Rule 13(a) refer to "any claim" without any identifiable exceptions.

First, this Circuit has recognized Rule 13(a) as a bar to subsequent actions in foreign courts. In Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 855 (9th Cir. 1981), the district court enjoined Northwest Sport from filing a related claim in Canada. On appeal, this Court concluded that the failure of Northwest Sport to assert a compulsory counterclaim in district court barred the defendant from filing a subsequent claim in Canada under Rule 13(a). This Court concluded that, "the rationale of the cases upholding injunctions against subsequently-filed federal court actions applied with equal force to this case where the compulsory counterclaim was brought in the courts of Canada." Id. at 856.

Second, the federal authorities interpreting Rule 13(a) do not limit its

application to only subsequent federal actions. In Brown v. McCormick, 608 F.2d 410, 416 (10th Cir. 1979), the Tenth Circuit enjoined a party from pursuing a separate, subsequent action in Arizona state court under Rule 13(a) after having been defaulted in a prior federal court action. Other federal courts agree. See Fantecchi v. Gross, 158 F. Supp. 684, 686–87 (E.D. Pa. 1957) (district court is "empowered to bar a defendant who fails to allege a claim which constitutes a compulsory counterclaim under Rule 13(a) from subsequently asserting such claim and/or is empowered to enjoin a State Court proceeding, which is based on a claim which is properly a compulsory counterclaim in a Federal action under Federal Civil Rule 13(a)"); Bruce v. Martin, 680 F. Supp. 616, 620 (S.D.N.Y. 1988) (finding a federal court may enjoin a party from bringing its compulsory counterclaim in a subsequent state court action – "This reasoning was adopted by Congress in enacting Section 2283 when it included in Section 2283 the language 'necessary in aid of its jurisdiction' to permit Federal Courts to restrain subsequent State Court actions after removal of the original State Court actions to the Federal Courts. The same reasoning should be employed with respect to compulsory counterclaims under Federal Civil Rule 13(a) so as to authorize this Court to enjoin the State

Court action which is admittedly based on a claim which is in the instant case a compulsory counterclaim under the provisions of Rule 13(a)."

Third, the County's argument related to the Rules Enabling Act, 28 U.S.C. §2072(2) is unavailing. The Rules Enabling Act prevents federal courts from enacting rules which "abridge, enlarge or modify any substantive right." Application of Rule 13 does not abridge the County's substantive rights. Appellant Citizens for Free Speech ("Citizens") does not contend that Rule 13(a) precluded the County from asserting its abatement counterclaim in the Prior Action. Rather, Citizens contends that the "manner and the means" by which the County was required to assert its abatement counterclaim was governed by procedural rule. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407, 130 S. Ct. 1431, 1442, 176 L. Ed. 2d 311 (2010) ("What matters is what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not.) Here, Rule 13(a) did not serve to limit the County's substantive rights to abate the alleged nuisance. In light of the allegations of the First Action, Rule 13(a) merely served to require that the County's right to pursue a civil action be pursued

in the Federal Action rather than a subsequent civil action, whether in state court or otherwise. This requirement did not impact the County's administrative or criminal options, particularly in light of the fact that the Code expressly permits the County to seek abatement through court action. Addendum to Opening Brief, §17.59.190.

Fourth, the County's citation to Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO v. G. P. Thompson Elec., Inc., 363 F.2d 181, 184 (9th Cir. 1966), for the proposition that Rule 13(a) should be applied as a bar to the County's abatement action, is entirely misplaced. In that action, this Court concluded that Rule 13(a) did not bar the right to seek relief of a collectively bargained contract right in arbitration when the adverse party filed an action in federal court related to the contract right while the arbitration was pending. This Court held that "if one of the disputing parties could, by filing a complaint alleging a grievance outside the scope of the agreement for arbitration, force his opponent to by-pass arbitration and assert counterclaims as to controversies otherwise arbitrable, the desired intent and purpose of arbitration agreements could be effectively frustrated." Id. at 185. This Court refused to find the claim to be compulsory because doing so would violate the employee's collectively

bargained rights under the Labor-Management Relations Act. Id. These facts, and the holding of Local Union No. 11, has no application to this case.

B. The Prior Action's Declaratory Judgment Did Not Relieve the County of the Obligation to Bring a Compulsory Counterclaim to Abate the Signs.

In its Answering Brief, the County contends that there was no obligation to assert the abatement counterclaim in the Prior Action because the result of the litigation "necessarily resolved" the enforceability of the Code as it related to Citizens' Signs. (Opening Brief, p.16). This argument misses the mark for two reasons.

First, if the district court's conclusion were correct that a counterclaim for abatement in the Prior Action was truly superfluous, then there would be no purpose for a subsequent abatement proceeding by the County. The fact that the County had to bring a subsequent administrative action – after the Judgment in the Prior Action – to justify its removal of the Signs establishes conclusively that an abatement procedure is not merely the "flipside" to a prior declaratory relief action, but is a separate and subsequent claim requesting different and affirmative relief which arises from the same core set of facts litigated in the Prior Action.

Second, judicial determination of the constitutionality of certain portions of the Code in the Prior Action did not provide the County all of the relief it now seeks. The Prior Action's declaratory findings did not include final approval for the County to abate the Signs. Nothing in the orders filed in the Prior Action referenced anything about the application of the Abatement Procedure or its approval. Had the County filed a counterclaim seeking declaratory relief related to the abatement – as opposed to merely the enforceability of the Code – then any such declaratory judgment approving the abatement might justify the County's argument.

Contrary to the district court's rationale, an abatement counterclaim would not have been superfluous in the same way as a counterclaim to a purely declaratory relief claim would be seen as superfluous. The district court's conclusion – and the case it cites -- Twin City Fire Ins. Co. v. McBreen & Kopko LLP, 847 F. Supp. 2d 1084 (N.D. Ill. 2012), applies only where the declaratory judgment resolves the parties' dispute. For example, there is no need for a counterclaim when the only claim between the parties is seeking judicial declaration of the rights of an insured to coverage. Id. at 1088. Once the decision is rendered, it satisfies both parties' respective

claims. However, that same judicial declaration on the existence of coverage does not then also simultaneously render the insured the automatic right to recover a specific dollar amount toward reimbursement for fees paid before coverage was determined. In that example, as in this case, the judicial determination is only a portion of the total relief which the parties could have sought. If the County wanted to obtain the right to abate the Signs, in addition to declaratory relief, it should have done so in the Prior Action. The pending abatement action is not merely the flipside to the declaratory relief claims in the Prior Action. Nothing in the Prior Action "necessarily resolved the question of the County's right to enforce the challenged ordinance" by way of abatement. (Answering Brief, p. 17). That enforcement action could only have been resolved by way of asserting a compulsory counterclaim in the Prior Action prior to Judgment.

C. The Injunction in the Prior Action Did Not Preclude the Commencement of an Abatement Counterclaim, it Merely Prevented the County from Attempting to Remove the Sign or Take Other Direct Action Against Citizens.

The County contends that, in addition to not being required to bring its abatement counterclaim, it was affirmatively prohibited from doing so

under the Prior Action's preliminary injunction. This argument has no support.

The County fails to cite the Prior Action's Preliminary Injunction completely, and with the appropriate context. The Preliminary injunction (Prior Docket 50), merely restrained the County from taking affirmative action to remove the Signs or from punishing Citizens for maintaining the Signs. Id. The Injunction enjoined the County:

> from any and all conduct in enforcement of sections 17.18.130 and 17.54.080 the Zoning Ordinance1 that prohibits Plaintiffs from displaying the Signs, encumbers Plaintiffs' right to display the Signs, interferes with Plaintiffs' practical ability to display the Signs, or penalizes or punishes Plaintiffs' property relating to the Signs.

Id. at p. 2.

The injunction cannot be read to prevent the County from asserting any legal rights, or asserting any legal claims in a pleading related to the subject matter. The injunction was clearly designed to prevent the County from removing the signs, liening Citizens' property, levying fines, or taking other direct action against Citizens. Fed. R. Civ. P. 65(d) provides that every injunction must "state its terms specifically; and describe in

reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." In this case, the injunction does not specifically prohibit the County from asserting any legal claims related to the subject matter. Thus, the injunction cannot be read as broadly as the County suggests and still be valid under Rule 65(d). The County does not contend that the injunction was invalid. Thus, the County cannot contend that it was enjoined from asserting an abatement counterclaim.

Even if the County was enjoined for a time from asserting a counterclaim, the injunction was dissolved four months before the Judgment, giving the County ample time to seek amendment of its Answer to bring all compulsory counterclaims which were required under Rule 13(a) prior to the Judgment. (See Answering Brief, p.18).

D. Claim Preclusion Cannot Precluded Citizens' Rule 13(a) Argument.

The County raises a bizarre contention that claim preclusion bars Citizens' Rule 13(a) theory. (Answering Brief, p. 21). According to the County, Citizens could have, but failed to, assert its Rule 13(a) theory in the Prior Action and are thus barred from seeking it in the pending action from

which this appeal lies. This argument has no merit.

It is axiomatic that a compulsory counterclaim is only barred upon entry of final judgment. Until the judgment is entered, the County could have sought amendment of its Answer to bring any counterclaim which would have been appropriate under Fed. R. Civ. P. 15. The County has cited no authority for the proposition that the bar of Rule 13(a) is effectively waived if the asserting party does not raise it as a potential (and potentially unripe) issue in the prior action. Nor does the County's argument make much sense practically.

Parties in litigation often are unaware of the potential counterclaims which their adversaries might possess. Requiring every party to raise a Rule 13(a) issue in every case, whether or not it may eventually be asserted, makes no sense and has no support in the authorities. Indeed, it is the affirmative obligation of the holder of the counterclaim to understand the ramifications of Rule 13(a), and not the burden of the initial complainant to raise it.

E. The County's Focus on the Effect of the Prior Action Judgment Is Inapposite to Claim Preclusion Application.

For purposes of determining if claim preclusion applies to bar the

County's attempted subsequent abatement action, this Court need not examine the effect of any of the findings contained in the Prior Action's Judgment. It is entirely irrelevant whether the Judgment in the Prior Action enjoined enforcement of the Code or did not. Claim preclusion deals only with what claims were available to the parties, whether they arose from the same "nucleus of fact" and whether the County could have raised the abatement claim in the prior action. Mpoyo v. Litton Electro-Optical Sys., 430 F.3d 985, 987 (9th Cir. 2005).

Indeed, the County's Answering Brief merely confirms Citizens' position that the County had the abatement claim available to it during the Prior Action (Answering Brief, p. 23, "It was clear to all in the prior litigation that the County would re-instate its enforcement action after judgment"), that it considered taking abatement action both during the Prior Action and after the Judgment, and that the County confirmed to the district court in the Prior Action that nothing stood in the way of it commencing abatement proceedings. Id. at p. 24. The fact that the Judgment did not enjoin the County – or protect Citizens, for that matter – is totally irrelevant for res judicata purposes. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003),

makes this plain. Citing United States ex rel. Barajas v. Northrop Corp., 147 F.3d 905 (9th Cir.1998), this Court explained that, "It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought." Tahoe-Sierra, 322 F.3d at 1078. Thus, whether the Prior Action approved and condoned the County's expressed intent to abatement of the Signs, or if the Prior Action disapproved of it, or if the Prior Action took no position, it matters not to the res judicata analysis. If the abatement could have been raised in the Prior Action, and was not, it is barred.

The County's contention that Rule 13(a) cannot be applied lest Citizens be permitted to maintain their signs in perpetuity also lacks support in the law. Citizens has the right to ensure that all claims existing between it and the City related to the Signs will be litigated in one proceeding. If the County fails to assert its compulsory counterclaims, they are forever barred. There is nothing distinct in the facts of this case which render all the Rule 13(a) authorities inapplicable. Failure to raise a compulsory counterclaim applies as equally to the County as it does to any other litigant in federal court. The County's argument for special

exceptions to Rule 13(a) because of the alleged illegal Signs has no support in the Rule 13 jurisprudence.

1. The County Continues to Incorrectly Contend that It Was the Prevailing Party in the Prior Action.

Buried in the sub-text of the County's argument on its incorrect application of res judicata, is the false version of the Prior Action in which the County asserts that it was the prevailing party. Although not directly germane to any relevant issue on appeal, the County raises this issue to show that Citizens failed to obtain injunctive relief prohibiting the County from abating the Signs, effectively losing the Prior Action, and so res judicata does not apply.

As shown above, the contents of the Judgment are immaterial to the res judicata analysis. Even so, the County did not prevail, Citizens did. Citizens' action resulted in the County amending two unconstitutional sections of its Code which the County vehemently defended notwithstanding the blatant infirmities. For their efforts on behalf of all persons previously subjected to unconstitutional restriction of speech, Citizens were awarded nominal damages and attorney's fees. Contrary to the County's view, "the equal protection claim that Citizens prevailed upon

is significant," (ER Vol. 3, p. 156) and "the County's subsequent amendment of the section was legally significant, as it served to correct an unconstitutional ordinance dealing with both the equal protection clause and the First Amendment, important public issues. The public will (theoretically) benefit by having a constitutional zoning ordinance in place." ER Vol. 3, pp. 156-157.

F. Citizens is Not Required to Exhaust Administrative Remedies Prior To Seeking Application of Rule 13(a) and Issue and Claim Preclusion.

The County's argument that Citizens must exhaust their administrative remedies prior to seeking injunctive relief in the federal court is meritless. (See Answering Brief, p. 33). The case cited by the County actually expressly states that it does not stand for the proposition for which the County offers it. The Tenth Circuit explained that "we do not decide today that court judgments cannot have preclusive effect in administrative proceedings," N. Nat. Gas Co. v. Trans Pac. Oil Corp., 529 F.3d 1248, 1251 (10th Cir. 2008), and instead explaining that the federal court lacked subject matter jurisdiction to interfere with an ongoing proceeding with the Federal Energy Regulatory Commission. Id. The

question was one of subject matter jurisdiction related to whether or not the court should decide what "Congress [had] declared [that] the Board exclusively should hear and determine in the first instance." Id.

CONCLUSION

The district court incorrectly applied the doctrine of res judicata and Rule 13(a) to determine that Citizens had no reasonable probability of success. This was clear legal error. That legal error was compounded by the abuse of discretion in finding Citizens faced no immediate injury and that a balancing of the hardships and public interest favored the County. Citizens respectfully request this Court reverse the Order of the district court, and remand this case with instructions to enter the preliminary injunction.

DATED: This 14th day of August, 2018.

ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, Nevada 89503

/s/ Frank C. Gilmore
FRANK C. GILMORE – California Bar No. 283859
Attorneys for Plaintiffs-Appellants- CITIZENS FOR FREE SPEECH, LLC and MICHAEL SHAW

CERTIFICATE OF COMPLIANCE TO FED R. APP. 32(a)(7)(C) and CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply Brief is proportionately spaced with a typeface of 14 points or more, in Georgia font, generated in the MICROSOFT WORD processing software and contains approximately 3952 words.

DATED: This 14th day of August, 2018.

ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, Nevada 89503

/s/ Frank C. Gilmore
FRANK C. GILMORE – California Bar No. 283859
Attorneys for Plaintiffs-Appellants- CITIZENS FOR FREE SPEECH, LLC and MICHAEL SHAW

CERTIFICATE OF SERVICE

U.S. Court of Appeal Docket:
No. 12-17102

I hereby certify that I am an employee of Robison, Sharp, Sullivan & Brust and that on this date I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: This 14th day of August, 2018

/s/ Mary Carroll Davis
MARY CARROLL DAVIS